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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

IMPLICATIONS OF HUMANITARIAN ACTIVITIES FOR THE ENJOYMENT OF HUMAN RIGHTS

Further preparatory document submitted by Mrs. Claire Palley on the question of the role of the United Nations in international humanitarian activities and assistance and human rights enforcement, bearing in mind the principle of non-interference

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Introduction

1. The present document is prepared pursuant to Commission of Human Rights resolution 1994/23 inviting the Sub-Commission to give due regard to new developments in the field of human rights and to its decision 1994/103 requesting the Sub-Commission to present its recommendations to the Commission on studies and related efforts undertaken by the Sub-Commission, "having due regard for any working papers the experts may wish to prepare without financial implications". It expands the reasoning in the earlier preparatory document on the subject (E/CN.4/Sub.2/1993/39) which, together with several Sub-Commission debates, led the Sub-Commission to pass resolution 1993/38 on 26 August 1993 in which it recommended that the study proposed in that document be undertaken. Reference should be made to that earlier preparatory document for issues and events before mid-1993 which indicated the need for a comprehensive study on the role of the United Nations in humanitarian activities and assistance and human rights enforcement.

2. Ultimately responsible, as States Members of the United Nations are, for the many developments in these spheres, with the General Assembly taking an active initiating role in respect of humanitarian assistance and promotion of international cooperation in the humanitarian field, (see, e.g., resolutions 43/131 and 45/102), the provision of scientific information about recent United Nations and Member State practice, with correlation of apparently disparate activities, will be useful to Member States. Moreover, an overview of the impact occasioned by the evolving functions in these spheres of various United Nations organs and of United Nations-authorized institutions is essential, because exercise of such functions is arguably affecting fundamental characteristics and capacities of the United Nations as the world organization simultaneously responsible for maintenance of international peace, development of friendly relations based on respect for the principle of equal rights and self-determination of peoples, and for achieving international cooperation in solving international problems of a humanitarian character and in promoting and encouraging respect for human rights. Such a study will complement work already being done by the appropriate committee of the General Assembly (see resolution 48/36). An independent Sub-Commission study will make available to all Member States - not only to those blessed with large legal and research departments - the proliferating academic theories, which may well later be translated into practice by some States without the world community as a whole being in a position to appreciate their implications. Such a study will have the further advantage of being prepared independently of the United Nations bureaucracy, whose own potential for influencing United Nations action may well prove to be an issue, because much of the development in the humanitarian and enforcement fields has been stimulated by a very capable human rights-oriented Secretariat. Ready availability of competing lines of argument, used to advance or oppose particular interpretations of power under the Charter or specific proposed actions, will be useful to States when formulating their positions on major issues, likely to arise in the General Assembly, concerning the impact of evolution of United Nations humanitarian activities and assistance and human rights enforcement on the character and appropriate powers of United Nations organs and institutions. As Sub-Commission members have often declared: information is power.

3. The Sub-Commission is the appropriate venue for initiating and developing such a study, which requires expertise in the theory and the practice of human rights, humanitarian law, refugee law, United Nations law and international law generally. In particular, the implications of Articles 1 and 2 of the Charter (the Purposes and Principles of the United Nations) and of Articles 55 and 56 (the Organization's and its Members' responsibility for promoting universal respect for and observance of human rights), together with the developments in United Nations and State practice since the United Nations' establishment in June 1945, need to be drawn out and appraised. The Sub-Commission has been involved in examining the causes of human rights violations, the prevention of their escalation, preventive action (especially in relation to ethnic minorities, prohibition of involuntary population transfers and population flows) and the need for realization of economic, social and cultural rights, security-related questions (whether in respect of inadequate control over supply of arms or the use of weapons of mass destruction), minimum humanitarian standards in situations of internal violence (see E/CN.4/Sub.2/1991/55) and human rights and humanitarian law in time of armed conflict. Indeed, the Commission on Human Rights in 1990 called upon the Sub-Commission to study these last matters further, with a view to making proposals to the Commission for further action promoting better respect for such norms (see Commission resolution 1990/66). Furthermore, in 1982 the link between gross violations of human rights and international peace and security was being studied by the Sub-Commission (see E/CN.4/Sub.2/1982/18).

4. The Commission on Human Rights has also concerned itself with security matters during the course of its deliberations, making recommendations in situations where there has been armed conflict, either international or internal, and invoking humanitarian law. 1/ It should be obvious that gross violations of human rights may affect international peace and that breach of the peace entails grave violations of human rights and often breaches of humanitarian law. Thus the Security Council, quite apart from its duty, under Article 24.2 of the Charter, of acting in accordance with the United Nations Purposes and Principles, must be concerned with human rights and humanitarian law questions. The Commission on Human Rights has welcomed, in its most recent resolution, S-3/1 of 25 May 1994, adopted without a vote at its third special session on Rwanda, the decision of the Security Council to expand the mandate of the Rwanda peace-keeping operation under resolution 912 (1994) to include responsibilities to contribute to security and protection of displaced persons, including establishment of "secure humanitarian areas" and to provide security for humanitarian relief operations. The Commission also affirmed that the international community will exert every effort to bring to justice persons who violate human rights or international humanitarian law. Furthermore, the Commission requested the High Commissioner on Human Rights to ensure that efforts of the United Nations aimed at conflict resolution and peace-building in Rwanda are accompanied by a strong human rights component. A Sub-Commission study, containing information and analysis of human rights and humanitarian questions, including reflection on the actions by United Nations organs and their effect, in no way impedes the competence of executive United Nations organs, except in so far that reflection may influence Members' future views on particular policies.

5. Concerns of United Nations organs or institutions established under the authority of the Charter must overlap when such bodies address the causes of human rights violations and preventive measures. For example, UNHCR's mandate has informally been expanded to deal not only with refugee problems, but to look at their causes, violations of human rights and resolution of conflicts, 2/ with this extension being effected by the General Assembly's endorsement of the High Commissioner's reports and her good offices. Furthermore, General Assembly resolution 47/105 has welcomed activities in respect of displaced persons and their protection within States of origin. This institutional overlapping is particularly apparent in the comprehensive study on the human rights issues related to internally displaced persons prepared by the Representative of the Secretary-General (E/CN.4/1993/35, annex).

6. Similar overlap has occurred with the operationalizing of the Security Council's ability to take decisions on extended peace-keeping or to grant mixed peace-keeping, peace-making, peace-building and humanitarian mandates, developments described in An Agenda for Peace. 3/ The Council itself recognized interconnections, stating in its 31 January 1992 Summit Declaration that non-military sources of instability in the economic, social, humanitarian and ecological fields could lead to threats to international peace. A significant humanitarian role undertaken by the Security Council is its assumption of power to grant "pacification" mandates. Such assumption can be seen as a new aspect of the Council's dispute-settling powers. In the post-cold war era, with settlement of long-standing conflicts, such as those in Cambodia, Namibia and El Salvador, the Council has, with the agreement of the States or parties concerned, granted variously mixed mandates, involving both security matters and humanitarian action, with effects going well beyond matters of "security" as traditionally interpreted. Other agencies, such as UNDP and UNICEF, as well as UNHCR, have been involved in working together in the field. These mixed mandates have required United Nations forces, observers and administrators to assist in transition to new democratic regimes, to monitor or hold elections, to administer, to enforce law and order (but without as yet establishing judicial machinery), and to deal with massive problems of resettlement of repatriated refugees and displaced persons. In such situations, the potential for conflict between political and humanitarian aspects of the mandates and long- and short-term aims is considerable. For example, quick moves to democracy with an absence of confrontation, as against enforcement of human rights and a blind eye to violations, is a charge levelled against the United Nations administration in Cambodia (UNTAC). 4/

7. The expansion of classical peace-keeping (by way of verification by and neutral interposition of forces stationed by consent of the host State) into authorization of the use of force (as first shown in Namibia in April 1989 against SWAPO infiltrators) into authorization of full-scale war against Iraq after the latter's invasion of Kuwait, and then into lesser but still considerable use of armed force in internal and international armed conflict in Somalia and in Bosnia and Herzegovina, has required alterations in the United Nations rules of engagement and raised questions about the applicability of humanitarian law to United Nations forces, 5/ in particular the permissible degree of force employable, the requirement of proportionality, 6/ the prohibition against indiscriminate use of force

impacting on civilian populations, the applicability of humanitarian law to protect United Nations personnel in conflict or when captured, and the observance of human rights by members of United Nations forces or any United Nations administration. 7/

8. It will be obvious that these issues raise potential difficulties of reconciliation between the Security Council's security-cum-political dispute settlement mandate and its duty under Article 24.2 of the Charter to act in accordance with the United Nations Purposes and Principles. Articles 1 and 2 of the Charter arguably require the Council to respect human rights, to act in conformity with international law (i.e. including humanitarian customary law) 8/ and to cooperate in solving problems of a humanitarian character. There will in practice always be difficult choices between values and their respective primacy when the Security Council authorizes peace-keeping - itself a humanitarian operation because armed conflict results in human rights violations and flows of displaced persons and refugees. The use of force has political effects, which may counteract the humanitarian objectives of the action. For example, force used to protect persons or in United Nations forces' self-defence involves direct confrontation with other armed forces or factions, such a protective role leading to rejection of the notion that United Nations forces are neutral and impartial. The threat or use of force to protect "safe areas" and besieged towns likewise means that the United Nations forces will not be perceived as neutral.

9. Similarly, United Nations reporting of alleged crimes against humanity, war crimes and genocide means that its political function of negotiating a settlement becomes more difficult. If the United Nations seeks a settlement, rather than seeing continuing or worsening violence, its negotiators will in practice have to deal with persons allegedly responsible for such crimes and they will be tempted to ignore the violations, effectively tolerating impunity, a violation itself of human rights. The Security Council has always, as a component of peace-keeping, simultaneously encouraged negotiation processes - usually by way of the Secretary-General's good offices (which themselves often have a major humanitarian component, agreed to by the parties).

10. Once the Secretary-General, or negotiators accepted by concerned parties, has proposed compromises to end particular conflicts, there is risk of having to choose between restoring peace and long-term observance of human rights. A settlement in Bosnia and Herzegovina or Croatia, which legitimated "ethnic cleansing", ethnic discrimination, grave violations of human rights and the fruits of covert aggression by any neighbouring State, would, were it endorsed by the Security Council, contravene the Purposes and Principles of the United Nations as well as the purposes pledged by Article 56 to be achieved by joint and separate State action in cooperation with the Organization. 9/ In fact, in Security Council resolution 820 (1993) the Council commended the peace plan for Bosnia and Herzegovina and called on the Bosnian Serb party to accept the peace plan in full. At the same time the resolution (para. 7) endorsed the principle that all displaced persons have the right to return in peace to their former homes and should be assisted to do so.

11. It is depressing to compare this resolution with the reality of non-implementation of such resolutions: General Assembly resolution 3212 (XXIX) of 1 November 1974 and Security Council resolution 365 (1974) on Cyprus called for urgent measures to permit refugees who wish to do so to return to their homes in safety.

12. Another significant development occurred in a sphere where the Security Council's security and humanitarian mandates intersect with the Charter-confirmed authority of States to retain their sovereignty and normal incidents of that sovereignty (such as judicial power in respect of internal events) unless there has been modification by the procedures stipulated in the Charter, e.g., amendment or an agreement. The Council determined that the commission of atrocities in the former Yugoslavia constituted a threat to the peace, and subsequently established machinery to prosecute and try in an international criminal tribunal individuals alleged to have committed crimes against humanity in armed conflict. The tribunal's establishment was considered by the Council to be a contribution to the restoration of peace, but it is arguable whether the Charter has given power to the Council to create judicial tribunals, 10/ and whether it may deal with matters of individual responsibility. 11/

13. Anticipatory action, deterrence,counter-measures to restore or maintain peace and measures of reparation potentially conflict with other United Nations mandates, notably States' sovereign equality, self-determination (of their peoples) and legal rights preserved by Articles 1.2, 2.1. and 2.7 of the Charter and thus authorized in so far as not limited by the exception within Article 2.7. The Security Council, by Article 24.2, must in discharging its duties act in accordance with these mandates, as they form part of the United Nations Purposes and Principles. Arguably, the demarcation of the Iraq-Kuwait boundary (by Security Council resolution 773 (1991)) is contrary to the rule of international law that boundaries are demarcated by States, either in treaties or following arbitral awards made by agreement. More significant from a human rights perspective is Iraqi subjection (by Security Council resolution 687 (1991)) to a compensation mechanism, with a Compensation Commission composed of 15 Security Council members, and the sequestration of Iraq's major natural resource, with its allocation for compensation purposes to persons other than those determined by Iraq. This arguably contravenes the Iraqi peoples's right freely to dispose of their natural wealth. Furthermore, article 1.2. of the International Covenant on Economic, Social and Cultural Rights provides that "In no case may a people be deprived of its own means of subsistence".

14. There are also conflicts as between mandates or functions and duties of the same organ. Whereas the Security Council has authority by Article 41 to impose measures interrupting economic relations (sanctions or embargoes) 12/ it is also mandated by Article 1 of the Charter to promote respect for human rights (including the social and economic rights), to solve problems of a humanitarian character, and to settle international disputes in conformity with international law, this last comprehending humanitarian law. Sanctions imposed by the Council have indiscriminately impacted on civilian populations. This is a matter on which the Sub-Commission took decisions in 1990 and 1991, the Sub-Commission long having been much concerned with "the right to food", appealing to all those participating in sanctions against Iraq

not to prevent the delivery of necessary food and medicine (decision 1990/109) and to take urgent measures to prevent the death of thousands of innocent persons, in particular of children (decision 1991/108). Although sanctions' regimes have provided for humanitarian exceptions, permitting, subject to the supervision of a sanctions committee, the delivery of foodstuffs, medical supplies, cooking and heating fuel and materials essential for civilian needs, humanitarian organizations report the infliction of suffering such as to lead to hunger, malnutrition and deaths of vulnerable persons (children and the old). It is arguable that the Sanctions Committee does not have adequate information to act promptly to suspend the operation of sanctions when undue suffering is being caused by an embargo on particular commodities. 13/ A less serious, but nonetheless considerable, consequential impact of sanctions has been felt by the populations of third party States uninvolved in any conflict.

15. This has made apparent the inadequacy of Article 50 of the Charter as a protective procedure from Security Council action. In fact, "a certain inconsistency was noted in United Nations action: on the one hand imposing an embargo and on the other hand developing modalities to assist the victims of such measures". 14/

16. There are no criteria, developed by the United Nations for guiding decision-making and choice in cases of conflict between duties, functions, rights and values. Practitioners with refugee and international relations expertise and experts in the human rights and moral fields have proposed operational guidelines, assisting the taking of difficult decisions. Long before, the ICRC, acting in accordance with its Statutes, had developed principles for this purpose and to ensure its neutrality. Influenced by these, the 1992 Providence Principles of Humanitarian Action in Armed Conflicts were developed as norms which international humanitarian institutions and practitioners should strive to apply. 15/ Similar principles were produced in 1994 as the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies, adding "empowerment" as a criterion to the earlier proposed criteria of "humanity, impartiality, neutrality and independence". 16/ Legal principles akin to these prudential criteria need to be enunciated to assist United Nations decision-making. Such principles are implicit in humanitarian law and in general international law, in particular the principle of humanity, which underlies both human rights and humanitarian law. 17/ Other implied legal principles are proportionality and necessity. 18/

17. Minimum use of force has long been a principle recognized in the United Nations rules of engagement. Other principles include universality, impartiality and non-selectivity in the application of human rights standards - principles reaffirmed in the 1993 Vienna Declaration and Programme of Action. Non-discrimination, neutrality and independence (each with different connotations), consistency, non-retrospectivity, procedural fairness and reasonableness are legal principles implicit in the body of international law. It needs emphasizing that legal principles do not dictate decisional outcomes: all they do is encourage consistency and predictability by drawing the attention of those responsible to relevant considerations. Conformity to - in the sense of giving due consideration to - principles has the added advantage of preserving an image of legitimacy. When, in this sense of

legitimacy, decision-making organs are perceived as acting in accordance with recognized procedures and criteria, it is more likely that their decisions will be accepted and effective. On the other hand, what principles, guidelines, criteria, etc. cannot do, is provide a coherent theory, say, regarding humanitarian intervention, which will be invariably applicable. Nor could they act as a litmus test as to when and how to intervene or take detailed action in any particular set of circumstances.

18. It should also be noted that there has been no legal argument produced as to a duty to take humanitarian enforcement action. The legal duty is to consider, in accordance with legal principles, whether such action is appropriate and is likely to be effective. If this is done, decisions to act may or may not be taken, depending upon the circumstances, but criticism that there have been apparently arbitrary exercises of discretion not overtly guided by recognized criteria will be more difficult to level.

19. A broadly similar approach indicating a set of conditions which need to be satisfied before a "right of humanitarian intervention" becomes applicable, together with guidelines for intervention, has been set out in a useful study by a team of Australian officials, headed by the Foreign Minister. 19/ A similar approach based on customary law and on modern developments regarding the principles for extending humanitarian aid was taken in "Guiding Principles on the Right to Humanitarian Assistance 1992," adopted by the Council of the International Institute of Humanitarian Law.

20. The rapidly evolving role of the Security Council in authorizing peace-keeping forces to meet pressing humanitarian needs by ensuring safe delivery of aid and by protecting threatened civilian populations, with such action culminating in collective use of force, has been the most controversial development. It began in 1991 with the determination, in Security Council resolution 688, that Iraq's repression of the Kurds, Iraqi nationals in Iraq, threatened international peace and security in the region. Kurdish refugees were streaming towards the Turkish border, which gave colour to that characterization. However, without Iraq's consent, safe havens were established in the area, 20/ which assisted that area in subsequently becoming autonomous. The resolution also insisted that Iraq allow immediate access by international humanitarian organizations to all in need of assistance in all parts of Iraq.

21. Another development of acting without the consent of a State concerned was the continued stationing of UNPROFOR in Croatia by Security Council resolution 743 (1992), initial consent not being renewed. Many mandatory resolutions, affecting various of the new States formed from the former Yugoslavia and engaged in conflict in its one-time territory, have since then been made under Chapter VII of the Charter - such developments, however, being within traditional concepts, because neighbouring States were covertly or overtly threatening the peace.

22. Finally, in Somalia, where the Government had collapsed in a civil war continued by armed factions, Security Council resolution 794 (1992), expressing grave alarm at widespread violations of humanitarian law and dismay at the impeding of delivery of humanitarian supplies, authorized deployment

of United States forces in order to secure a safe environment for relief operations. The Somalia precedent is a less weighty precedent for possible future humanitarian interventions, because of the absence of a functioning Government. Indeed, the argument has been put that there is a "collapsed State" incapable of manifesting consent or non-acquiescence.

23. These developments were significantly summed up by the comment in An Agenda for Peace that such operations had occurred "hitherto with the consent of all parties concerned".

24. Recent Security Council practice abandoning the requirement for State consent or implied acquiescence to United Nations collective intervention under Security Council authority has reraised questions concerning the scope of Article 2.7 (the authority authorized by the Charter for States to retain exclusive competence in matters essentially within their domestic jurisdiction other than in case of action under Chapter VII).

25. There has been an explosion of writing on the lawfulness of collective humanitarian intervention, 21/ and revival of argument that individual States or a group of States have not only the right to take coercive action by way of self-defence under Article 51 of the Charter, combined with a duty to notify the Council, but also individual rights as States to engage in humanitarian interventions. 22/

26. The most radical approach to humanitarian intervention (or intervention following massive violation of human rights) has been put forward by American jurists. 23/ Professor Reisman reinterprets Article 2.4 of the Charter, which prohibits the threat or use of force against territorial integrity or political independence, so as not to preclude forcible assistance in pursuit of self-determination (a construction consistent with earlier assistance to overthrow colonialist regimes, something not contemplated by doctrine when the Charter was agreed, but later developed) or to maintain world order. Employing the concepts of political thought, he also sees "sovereignty" as "popular", and not as "State" sovereignty, in the context of the ongoing development of the concept of self-determination. On this basis, it would be lawful, assuming that refugee flows from the island of Haiti do not constitute a threat to the peace, for there to be intervention because the Haitian people's right to self-determination has been thwarted by a military coup d'état. 24/

27. Conversely, an expansive concept of self-determination may have the effect of precluding or invalidating intervention. The right to self-determination arguably encompasses the right of a people to survive in their current State and territory and this requires the people and State to have the right to defend itself. Such a right, it can be asserted, is a matter apart from Article 51, which allows self-defence until the Council has taken measures "necessary to maintain international peace" - objective wording implying that the right of self-defence persists if inadequate measures are taken. It may be that the continued application of the arms embargo, which the Security Council imposed (by resolution 713 (1991) on the former Yugoslavia, now extinct, can be characterized as being in breach of Bosnia and Herzegovina's right to self-determination. Although raised, the issue was not dealt with in the International Court of Justice's Order

following Bosnia's application for provisional measures, because the Court confined itself to examination of measures, and grounds for these, falling within the scope of the Convention on the Prevention and Punishment of the Crime of Genocide. 25/

28. Another approach has tentatively been put forward by Mr. Deng, the Representative of the Secretary-General on internally displaced persons: he proposes an international standard stipulating that "any Government that fails to provide the most fundamental rights for major segments of its population can be said to have forfeited sovereignty and the international community can be said to have a duty in those instances to re-establish it". 26/ Sovereignty will have "collapsed" by virtue of the Government's incapacity to prevent gross violations. If the world community intervenes to restore democratic self-government, the question is, how far may it go? May it establish a temporary government, or may it establish a constitution? In Somalia the Security Council has thought it inappropriate to take such steps, encouraging the various factions themselves to agree on such matters. If agreement is not forthcoming, should the Council content itself with temporary restoration of order and then just remove the forces it has authorized, at which stage human rights violations and human suffering will recommence? 27/

29. An equally radical view of the right of humanitarian intervention, but one excluding the use of force, has been proposed by French humanitarian thinkers. 28/ They claim that States have a right of unconditional free access to victims to safeguard life. Admittedly, the General Assembly, in a series of resolutions (beginning with resolution 43/131 (1988), has declared its concern about the suffering of victims of natural disasters and of emergency situations and emphasized the importance of humanitarian assistance. It has recommended that States in proximity facilitate such aid and has called for cooperation (res. 45/102). This is not a recognition by the General Assembly of such a right. 29/ However, the Assembly has welcomed the establishment by concerted action of temporary relief corridors for distribution of emergency aid (res. 45/100) and subsequently indicated that State acquiescence would suffice to permit provision of aid, rather than treating such provision as requiring a formal request by the State whose population was to be aided (res. 46/182).

30. In the longer term the duty of all Member States to cooperate in solving humanitarian problems (Charter, Article 1.3), the duty (under Articles 55 and 56) to promote solutions of economic, social, health and related problems and to achieve universal respect for human rights (including the economic and social rights) may come to be seen as imposing a responsibility on States to respect, as a minimum, the right to life of individuals and as creating a correlative right by State actors in a world constitutional system with a human rights regime to intervene when there are large-scale threats to life. At that stage, now current references to obligations erga omnes and the Barcelona Traction Case, 30/ to ius cogens, and to the Southern Rhodesian and South African precedents of mandatory sanctions based in part on failure to respect fundamental human rights, will be built on to develop a legal doctrine of international responsibility for enforcement of human rights. An alternative longer-term basis for such a doctrine would be State

responsibility and recognition of human rights and humanitarian norms as customary law. 31/ Such a doctrine may ultimately be incorporated in an amendment to the Charter.

31. An alternative approach, facilitating the right of States to provide assistance, would be recognition of an individual right to seek humanitarian assistance and protection. Such a right is a necessary implication of the right to life. A parallel notion is the right to seek asylum, which permits an asylum-granting State to contend that it is not committing an unfriendly act towards the asylum-seeker's State of origin. The great conceptual leap, however, is from action outside another State's territorial jurisdiction (in the case of receiving an asylum-seeker) to action within another State's territory (provision of humanitarian assistance).

32. Two other developments require consideration, namely the increasing invocation of humanitarian law by the Security Council and the rapid convergence of humanitarian and human rights law, whose common principles and mutual influence, rather than their separate historical origins, are coming to be emphasized. 32/ If they are to be integrated as a system, whether it be generically called human rights or humanitarian law (either being appropriate), 33/ it is essential to close the gap which arises when there is suspension of much of human rights law in time of an internal emergency, but the State concerned does not recognize the level of strife reached as amounting to armed conflict. In that hiatus humanitarian law does not become operative. 34/ The Sub-Commission has already lightly touched on this area in its study on public emergencies.

The nature of the legal issues

33. It is submitted that all the legal issues touched on above can only be understood in the context of the Constitution of the Uniced Nations, the Charter. 35/ So far as concerns mandates of Charter organs or institutions created by the United Nations, mandates arise at two levels: they are either granted directly by the Charter or by Charter institutions themselves delegating power by granting mandates within their competence. In all cases the mandated body has responsibility to observe the conditions of its mandate and is accountable to its authorizing body. Whether there is judicial review to pronounce on the validity of action under mandates, or merely a political process for ensuring conformity, is a hotly disputed issue. Even assuming power of review by the International Court of Justice to exist, 36/ bodies with mandates have provisional power to interpret their own competences as a necessary preliminary to action. Furthermore, the Court will be restrained in substituting its own interpretation of their competences, particularly where executive bodies concerned with world security are challenged.

34. Irrespective of whether judicial review is possible, the mandates, i.e. authorization by an instrument or body, must be analysed. The Charter of the United Nations, in creating organs with powers and functions, conditions such powers in the specific authorizing Articles and also subjects all powers to the Purposes and Principles set out in Articles 1 and 2, the latter being cast in mandatory language. In the case of the Security Council, Article 24.2 expressly requires the Council to act in accordance with the Purposes and Principles. The Organization and its Members, in good faith, and in pursuit

of the Purposes, are mandated to act in accordance with the Principles (Article 2). Additionally, the Organization as a whole and Member States are required by Article 56 to take joint and separate action in cooperation for achievement of the purposes set out in Article 55. Those purposes may briefly be described as humanitarian and as requiring observance of human rights, including the now-developed equal right of peoples to self-determination. It is here inappropriate to analyse in depth the Purposes of the United Nations (Article 1), but it can briefly be stated that they require cooperation in solving problems of a humanitarian character; respect for human rights (a sphere much developed over the 49 years of the Charter's "life") 37/ and for equal rights and self-determination of peoples; and conformity with the principles of justice and international law. The significance of these provisions is apparent in relation to Security Council action in imposing embargo measures. The question is whether the Council must always have regard to the basic principles of international humanitarian law and to human rights law, which to a limited extent is ius cogens from which no derogation is permitted. It appears, having regard to the Purposes in the Charter, that Article 103 of the Charter cannot be interpreted as allowing disregard of these principles and rules - as opposed to particular treaty obligations.

35. The Charter confers mandates not only on the organs it has created (and which in turn may create subsidiary bodies - Article 7.2), but it is arguable that States Members are given mandates by the Charter. Although the Charter is a Treaty, it is also a Constitution, established by the Peoples of the United Nations through their Governments' representatives (Preamble). By confirming the sovereign equality of Members (Article 2.1), by requiring territorial integrity or political independence of States not to be subject to force or the threat of force (Article 2.4) and by safeguarding States from United Nations intervention in matters essentially within the jurisdiction of any State (Article 2.7), the Charter confers (as well as confirms) such powers on States. Whatever the historic source of Member States sovereignty, the current source of authority is the Charter. In short, it accords mandates (irrespective of whether they are described as confirmatory or reservatory).

36. The Charter, as constituent instrument of the world political system, also prescribes the scope of and conditions upon which State authority (i.e. sovereignty) is exercisable. Arguably, the relevant conditions are, inter alia, conformity with the Purposes and Principles of the United Nations which Member States have pledged themselves to observe by assuming obligations under the Charter (Article 2.2). Thus, States are required to respect, in good faith, the self-determination of peoples, including the people of the State concerned, and to cooperate internationally in encouraging respect for human rights (including within the jurisdiction). In short, there is State responsibility (obligation) under the Charter.

Interpretation of the Charter

37. Legal norms at all levels require interpretation in order for action to be taken under them, whether by organs created directly or by delegated ones which seek to exercise any particular power. Interpretation is equally necessary to present arguments opposing proposed action. Should an actual exercise of power be challenged, the question arises whether the interpretation adopted by the relevant organ is merely provisional and

subject to judicial supervision, or whether it is conclusive and legally unchallengeable, whether for excess of power or jurisdiction, for errors of law (including misinterpretation and misapplication) or for abuse of power.

38. A spate of articles, provoked by recent International Court of Justice decisions, has discussed whether the Constitution of the United Nations, the Charter, and in particular the power it confers upon the Security Council, is subject to judicial review by the Court. 38/ Should such power of review not exist, the legitimacy of the Security Council may be diminished, with substituted political challenges occurring in the General Assembly. In any event, the Charter will be interpreted by the relevant political organs and may well also be interpreted by the International Court as principal judicial organ in relation to its Advisory Jurisdiction or when raised collaterally in contentious jurisdiction.

39. Different modes of interpretation need exploration, especially as a consequence of the growth of human rights law. Treaty interpretation is a subject allowing for multiple modes of approach. Neither the Vienna Convention on the Law of Treaties, nor the limited number of International Court opinions, or even views of the International Law Commission conclude the matter. Whether "the founding fathers'" (the drafters') intentions are to have primacy in interpretation, or whether a textual approach is to prevail, or whether a teleological approach should be adopted remain open questions. There is always a tendency for interpreting bodies to select the interpretative approach most convenient for the purpose in hand. It appears that the Charter, although a treaty, may be differently interpreted because it is the constitution of an international organization designed to grow organically over time. Nodding in that direction, the International Court of Justice has inferred powers for the United Nations which have not expressly been granted, but which are consistent with its purposes. 39/ In contrast, the textual approach appears from some Court decisions to be regarded as the established law, 40/ although recourse is permissible to supplementary material (as envisaged by the International Law Commission and article 32 of the Vienna Convention) such as the travaux préparatoires, including the debates and decisions on whether or not to add modalities and powers to the Charter. If the teleological interpretation is adopted, subsequent practice of Charter organs will be relevant, but this is problematic because of their political character and composition.

40. In short, is the Charter to be interpreted literally, restrictively, liberally, or purposively and in accordance with the founding fathers' views as expressed at the time or in accordance with their intentions as imputed to them had they been aware of later developments and practice? The methods of interpretation adopted may result in divergent conclusions as to the extent to which the Charter authorizes humanitarian assistance and activities and human rights enforcement. Should it be considered that particular organs have not been endowed with powers, the "non-legality" of any purported or covert exercise of such powers will be established. If interpretation, in contrast, accords United Nations organs powers not envisaged at the time of their establishment in July 1945, and ones not even envisaged until the last decade of the twentieth century, the legitimacy of exercising such powers will be doubtful. In either case, augmented pressures are likely for greater

transparency in the relevant organs' decision-making and for their having a different composition more appropriate for their newly acquired functions, which can impact on all Member States. 41/

Recommendations

41. In order to make available a comprehensive and coherent account of the significance of evolving functions and activities by United Nations organs and authorized institutions which have concerned themselves or impacted upon the human rights and humanitarian spheres, the undertaking of a study of humanitarian assistance and activities and of human rights enforcement in its overall United Nations context is recommended. The preceding paragraphs, as well as the 1993 preparatory document (E/CN.4/Sub.2/1993/39), will have made the relevance, timeliness and general outline and scope of the study obvious.

42. The activities undertaken by United Nations organs and authorized institutions in such spheres will first be surveyed. Once this material is available, it should be provided to States and the Sub-Commission for comment.

43. At that stage, there should also be a survey of States' own practice in relation to international humanitarian assistance and activities and human rights enforcement. (This can only be undertaken after the Commission confirms any Sub-Commission recommendation of a study.) State observations on such matters and on United Nations activities in these spheres, in particular State legal observations on interpretation of the Charter, will provide a basis for further analysis. In addition to States' views on collective United Nations activities in these spheres, their observations on the lawfulness of unilateral or group State international action in these spheres is necessary. From such surveys a picture of State practice and opinion both in relation to United Nations action and State action under the Charter in connection with these spheres should emerge.

44. A further stage will be the gathering of information on the modalities by which United Nations organs, agencies and other bodies authorized by the United Nations affect the realization of economic, social and cultural rights and, if this is the case, civil and political rights, for example by way of practices of conditionality.

45. State practices of coercive pressure to achieve such objectives will also be examined in the light of the equal sovereignty of States and the principle of non-interference. Work will have already been done by the Secretary-General in a report on human rights and unilateral coercive measures, pursuant to Commission on Human Rights resolution 1994/47, that will have been submitted to the Commission at its fifty-first session, in 1995.

46. The final stage will be, after the benefit of State and Sub-Commission comments on work done in each of the first two stages, appraisal of the effectiveness of current United Nations machinery and practice in implementing the United Nations Purposes contained in Article 1.3 of the Charter, namely achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights without discrimination.

Timetable

47. The preliminary report will concentrate on a survey of the practice of United Nations organs and authorized institutions in the spheres to be studied. This will be presented to the Sub-Commission at its forty-seventh session, at which Sub-Commission experts and State observers may assist in formulating guidelines for further work on the study. At the forty-eighth session the observations of States on the matters mentioned in paragraphs 43 and 44 above will be presented in analytical form, providing a basis for assessing the common opinion of States. The final report, containing an appraisal of the effectiveness of United Nations organs and institutions in relation to the studied spheres and Article 1.3 of the Charter, will be presented at the forty-ninth session.

Notes

1/ In the report on the situation of Human Rights in Kuwait under Iraqi Occupation (E/CN.4/1992/26), prepared for the Commission by Mr. Walter Kälin, humanitarian law is relied upon. There are numerous other cases of reports referring to humanitarian law, e.g, the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1993/25, paras. 508-510) and the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1993/46, paras. 60, 61, 664 and 684).

2/ UNHCR Guidelines of April 1993 concerning activities on behalf of displaced people state that UNHCR might consider getting involved to attenuate the causes of internal displacement and contribute to conflict resolution through humanitarian action. Such action was normally to be supplementary to the United Nations overall political or humanitarian efforts.

3/ An Agenda for Peace: Preventative Diplomacy, Peace-making and Peace-keeping, Report of the Secretary-General, United Nations Doc. S/24111 (1992), prepared at the Security Council's request. See also Gareth Evans, Co-operating for Peace. The Global Agenda for the 1990's and Beyond. Allen and Unwin, 1993.

4/ See Human Rights Watch, The Lost Agenda - Human Rights and United Nations Field Operations. New York, 1993.

5/ See Amnesty International, Peace-keeping and Human Rights, London, 1994, pp.32-33 and notes 88-94.

6/ See J.G. Gardam, "Proportionality and Force in International Law", (1993) American Journal of International Law 391, p.403 et seq.

7/ See Amnesty International, op. cit. Events in Somalia show that the United Nations administration did not appreciate the requirements of human rights for legal safeguards, a right to legal advice and due process for arrested persons.

8/ See Gardam, op. cit., p.410, where it is suggested that the entire law of armed conflict applies to United Nations operations. However, the Geneva Conventions of 1949 and the 1977 Additional Protocols, except to the extent that their provisions reflect or have become customary law, do not, as treaties, bind the United Nations. They bind signatories, who must ensure that their contingents conform. Currently, the ICRC is devising an acceptable mechanism for the United Nations to accept the substance of the Conventions and the Protocols: C. Caratsch. "Humanitarian Design and Political Interference: Red Cross Work in the Post-Cold War Period". (1993) International Relations 301, p.312. The General Assembly has often declared that it is guided by the principles embodied in the "accepted humanitarian rules as set out in the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977": see, for example, resolution 46/133 on the protection of all people against forced disappearances.

9/ The Sub-Commission in its resolution 1993/17 rejected any solution legitimating massive human rights violations, discrimination or genocide. In the Secretary-General's "set of ideas" for solution of the Cyprus problem, endorsed by the Security Council, these problems were skirted. The ideas largely recognized the ultimately enforceable right to return to their homes and properties of Greek Cypriots displaced following Turkey's 1974 invasion. The ideas are silent on any rights of Turkish mainland settlers, because transfer of part of Turkey's civilian population into occupied Cyprus is in breach of Article 48 of the Fourth Geneva Convention. See report of the Secretary-General (S/24472) of 21 August 1992, pp.6-7 and 18-19. General Assembly resolution 3212 (XXIX), 1 November 1974, para.5, endorsed by Security Council resolution 365 (1974) 13 December 1974.

10/ J.C. O'Brien in "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia" (1993) 87 American Journal of International Law 639, pp.692-4, for pragmatic reasons dismisses the suggestion that consensual measures (either a treaty or a General Assembly decision) were necessary to establish the tribunal. The author takes the view that the atrocities constitute a threat to the peace and the alternative remedies were exhausted. Does it make a difference if atrocities have ceased and order has been restored? Can such a tribunal only be established in medias res? Can the Council at any time create ad hoc criminal tribunals so as to maintain peace and how long can such a tribunal continue to exercise jurisdiction over events occurring after the restoration of peace? Could the Council establish a permanent tribunal? See also T. Meron, "War Crimes in Yugoslavia and the Development of International Law", (1994) 88 American Journal of International Law 78 on the significance of the tribunal for humanitarian law. The use by the United Nations of humanitarian law is discussed in D. Weissbrodt and P.L. Hicks, "Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict", International Review of the Red Cross, March-April 1993, pp. 120-138.

11/ See V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", (1994) 43 International and Comparative Law Quarterly 55, p.68.

12/ Ibid. p.55 et seq. for discussion of imposition of sanctions and other Security Council exercises of power under the Charter in the light of the legal institution of State responsibility and also on whether there are any limitations on the Council's powers of appreciation in characterizing a situation as one justifying the Council's overriding the legal rights of States. The standard work on sanctions is Gowlland-Debbas, Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia, 1990.

13/ It must be assumed that the Security Council is unaware of or does not accept that such deficiencies exist. If it were otherwise, the Council would be flouting a United Nations standard, namely article 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition adopted by the World Food Conference held at Rome in 1974 and endorsed by the General Assembly in its resolution 3348 (XXIX) of 17 December 1974, which proclaims the inalienable right of every man, woman and child to be free from hunger and malnutrition. The Declaration ends with an affirmation that participating States will make full use of the United Nations system to implement it.

14/ International Institute of Humanitarian Law, Current Problems of International Humanitarian Law, San Remo, 1993, p.21. For the humanitarian problems with embargoes see pp.19-24 and ibid., H.-P. Gasser, "Protection of the Civilian Population of States under Embargo Measures", pp.41-43.

15/ The leading formulators were L. Minear and T.G. Weiss following discussions at the Thomas J. Watson Jr. Institute for International Studies, Brown University, and the Refugee Policy Group. The Principles are reproduced in Minear and Weiss, Humanitarian Action in Time of War, Boulder, 1993, p. 20.

16/ World Conference on Religion and Peace, New York, 1994. Empowerment reflects human rights values of autonomy and the ideas of professionals in the refugee field, who see relief as the first step in a continuum of relief, reconstruction, rehabilitation and sustainable development.

17/ Cp. F.P. Feliciano, International Humanitarian Law and Coerced Movement of Peoples Across State Borders. International Institute of Humanitarian Law, San Remo, 1983, p. 6. Feliciano writes that the "principle of humanity ... is utilized as a shorthand way of referring to a cluster of human values all relating in greater or lesser degree to the physical and moral integrity and well-being of the human person. So understood, humanitarian law would comprehend not only international law relating to the conduct of armed conflict, but also international law concerning refugees and displaced persons and as well much, perhaps most, of the international law of human rights".

18/ Article 5.2 of the Declaration of minimum humanitarian standards, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, Turku/Abo, Finland, (E/CN.4/Sub.2/1991/55) provides: "Wherever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved".

19/ See Evans, op. cit., pp. 156-158. This invaluable study goes into detail about the role of the United Nations and the international community in securing peace. Inter alia, it makes specific proposals for improving structures and processes in the United Nations systems.

20/ UNHCR operations in Iraq were shortly thereafter secured by a Memorandum of Understanding with the Iraqi Government.

21/ A carefully framed positive formulation of the right to collective humanitarian intervention appears in R.Y. Jennings and A. Watts, Oppenheim's International Law, vol. 1, 9th ed., London, 1992, p. 443. A radical approach is taken by the Netherlands Advisory Committee on Human Rights and Foreign Policy and the Netherlands Advisory Committee on Issues of International Public Law, "The Use of Force for Humanitarian Purposes", Report No. 15, The Hague, 1992. A short summary of the law is given by C. Greenwood, "Is there a Right of Humanitarian Intervention?" (1993) 49 The World Today, Royal Institute of International Affairs, pp. 33-40. Fuller references to recent interventions and the current extensive literature appear in M.R. Hutchinson, "Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention," (1993) 34 Harvard International Law Journal 624; T.J. Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention," in L.F. Damrosch and D.J. Scheffer (eds), Law and Force in the New International Order, Boulder, Westview, 1991, p. 185; and for opposing legal and prudential arguments see S.A. Rumage, "Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right," (1993) 10 Arizona Journal of International and Comparative Law 1.

22/ For example, the Netherlands Advisory Committee on Human Rights and Foreign Policy and the Netherlands Advisory Committee on Issues of International Law, in "The Use of Force for Humanitarian Purposes", ibid., p. 13, asserted that humanitarian intervention by States in extreme cases of violations of human rights was not impermissible if the United Nations itself were, for whatever reason, unable to take a decision. The Committees powerfully argue that to avoid confusion United Nations action should be referred to as "enforcement action for humanitarian purposes".

23/ W.M. Reisman in "Coercion and Self-Determination: Construing Charter Article 2(4)," (1984) 78 American Journal of International Law 624 and in "Sovereignty and Human Rights in Contemporary International Law," (1990) 84 American Journal of International Law 866, and A. D'Amato, "The Invasion of Panama was a Lawful Response to Tyranny," (1990) 84 American Journal of International Law 516. Reisman's views were powerfully criticized by O. Schachter in "The Legality of Pro-Democratic Invasions," (1984) 78 American Journal of International Law 645.

24/ United Nations involvement in Haiti came with General Assembly resolution 45/2 of 10 October 1990. The later Security Council resolution (res. 841 (1993)) reflects such arguments, namely the failure to reinstate the legitimate Government of President Aristide, combined with there being mass population displacement following on a climate of fear of persecution. (The careful wording regarding "climate" is significant in relation to whether

individuals would be able to show personal well-founded fear of persecution, thus entitling them to claim refugee status after leaving Haiti and arriving in the territory (or jurisdiction?) of another State.) An earlier example of State practice using thwarting of self-determination as justification for intervention was India's action in 1971 in East Pakistan. For further arguments and potential developments see T.M. Franck, "An Emerging Right to Democratic Governance," (1992) 86 American Journal of International Law 1.

25/ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Request for the Indication of Provisional Measures, Order of 8 April 1993, reprinted in (1993) 87 American Journal of International Law 505 at 516.

26/ F.M. Deng, Protecting the Dispossessed. Brookings Institution, Washington, 1993, p. 140. Deng indicates that a duty is evolving that the world community should re-establish sovereignty, contending that protection and assistance of the internally displaced reconciles sovereignty with responsibility (pp. 14-20). At p. 119, he asserts that a Government cannot invoke sovereignty for the deliberate purpose of starving its population or otherwise denying them protection and resources vital to their survival and well-being. He suggests that if a Government is incapable of providing protection and assistance, there is a presumption that the international community, either on invitation or by international consensus, should act. Deng considers such a presumption to be consistent with traditional views of sovereignty. Reisman's revisionist view faces no such need for presumptions or fictions.

27/ It appears that the Economic Community of West African States may take a longer-term view in regard to Liberia than has the United Nations in relation to operations in Somalia. Regional organizations have an incentive to be more interventionist, because they are affected more severely by neighbouring turmoil. Great Powers have difficulty in finding the political will to involve themselves in "distant lands", unless major strategic or economic concerns are relevant.

28/ See M. Bettati, "The Right of Humanitarian Intervention or the Right of Free Access to Victims", (1992) 42 International Commission of Jurists Review 1, updating the arguments in M. Bettati and B. Kouchner, Le Devoir d'Ingerence, Paris, Denoël, 1987, and in M. Bettati, "Un Droit d'Ingerence," Revue Générale de Droit International, Pub. No. 3/1991, 639-670.

29/ It could not competently create one. At best a consensual resolution would be evidence of acceptance of the right as part of international customary law. There would also have to be general practice to that effect which was accepted as law.

30/ Case Concerning the Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain) 1970 International Court of Justice 3.

31/ See the important study by T. Meron, Human Rights and Humanitarian Norms as Customary Law. Oxford, Clarendon Press, 1989.

32/ See L. Doswald-Beck and S. Viha, "Humanitarian Law and Human Rights Law," International Review of the Red Cross, March - April 1993, p. 94 and J. Meurant, "Humanitarian Law and Human Rights Law. Alike Yet Distinct," ibid., p. 89.

33/ See J. Pictet, The Principles of International Humanitarian Law, Geneva, ICRC, 1966, p. 10. Pictet believed that international humanitarian law was constituted by all the international legal provisions ensuring respect for the individual and his well-being. Accordingly, humanitarian law covered both the law of war and human rights.

34/ T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", (1983) 77 American Journal of International Law 589-606.

35/ See V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility," (1994) 43 International and Comparative Law Quarterly 55; G.R. Watson, "Constitutionalism, Judicial Review and the World Court," (1993) 34 Harvard International Law Journal 1-45; and W.M. Reisman, "The Constitutional Crisis in the United Nations," (1993) 87 American Journal of International Law 83-100.

36/ This is implicit from the Judgments in the Lockerbie Case: Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 International Court of Justice 114 (Provisional Measures Order of 14 April). See T.M. Franck, "The 'Powers of Appreciation': Who is Ultimate Guardian of UN Legality?" (1992) 86 American Journal of International Law 519. In Lockerbie the Court declined to order Provisional Measures. It remains to be seen on the merits whether the claim by the Libyan Arab Jamahiriya that the imposition of economic sanctions for non-compliance with a Security Council mandatory call to surrender for trial two Libyan nationals accused of being involved in the blowing up of a Pan Am jet over Lockerbie will be upheld as a lawful overriding of Libya's sovereign rights to try its nationals for crimes allegedly committed by them, or whether Libya's failure to surrender them permitted the Council to determine this failure to be a threat to the peace, to call on Libya for compliance and to give effect to its decision under Article 41 of the Charter.

37/ The Commission on Human Rights and its subordinate Sub-Commission on Prevention of Discrimination and Protection of Minorities, established by the Economic and Social Council under Article 68 to promote human rights, are responsible for developing human rights concepts and standards, monitoring, reporting and procedures to encourage observance by way of ultimate public diplomatic examination in the Commission. The International Bill of Rights and the proliferation of human rights specialized treaties with custodial treaty bodies have resulted in widespread acceptance of standards and a degree of enforcement.

38/ See T.M. Franck, "'The Powers of Appreciation': Who is the Ultimate Guardian of United Nations Legality?" op. cit; Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", op. cit.; Reisman, "The Constitutional Crisis in the United Nations", (1993) 87 American Journal of International Law 83, who regards arguments in favour as "judicial romanticism"; O. Schachter, "United Nations Law", (1994) 88 American Journal of International Law 1 p. 13 et seq; and G.R. Watson, "Constitutionalism, Judicial Review and the World Court", (1993) 34 Harvard International Law Journal 1-45.

39/ See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, International Court of Justice Reports (1949) 174; Certain Expenses of the United Nations, International Court of Justice Reports (1962) 151; and South West Africa Cases (Second Phase) International Court of Justice Reports (1966) 6.

40/ The International Law Commission reached this conclusion: Yearbook of the International Law Commission 1966, II, p. 220.

41/ For arguments for change and some proposals, see D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council", (1993) American Journal of International Law 552-588; and Reisman, "The Constitutional Crisis in the United Nations", op. cit.